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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY CHACON, Defendant and Appellant.	F069786 (Super. Ct. No. BF142972A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

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Anthony Chacon (defendant) was charged by amended information with premeditated murder, committed by discharging a firearm from a motor vehicle at another person with intent to inflict death, and committed while defendant was an active participant in a criminal street gang and to further the activities of the gang; and during commission of which defendant personally and intentionally discharged a firearm and proximately caused great bodily injury or death, and intentionally inflicted great bodily injury or death as a result of discharging a firearm from a motor vehicle (Pen. Code,[1] §§ 187, subd. (a), 189, 190.2, subd. (a)(21), (22), 12022.53, subd. (d), 12022.55; count 1), premeditated attempted murder, committed by discharging a firearm from a motor vehicle at another person with intent to inflict death; and during the commission of which defendant personally and intentionally discharged a firearm (§§ 187, subd. (a), 189, 664, 12022.53, subd. (c); count 2), discharge of a firearm at an inhabited dwelling (§ 246; count 3), and active participation in a criminal street gang (§ 186.22, subd. (a); count 4). As to counts 1 through 3, it was further alleged the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)), and, as to all counts, that defendant served a prior prison term (§ 667.5, subd. (b)).

A jury convicted defendant of counts 1 through 3, but acquitted him of count 4 and found not true the allegations, with respect to counts 1 and 2, that the crime was premeditated. The jury found true all remaining special allegations on counts 1 through 3. After return of the verdicts, the prior prison term allegations were dismissed. Defendant's motion for a new trial was denied, and he was sentenced to prison for an aggregate term of life without the possibility of parole plus 40 years to life plus 20 years.

On appeal, we hold: (1) The trial court did not err by refusing to sever/bifurcate the gang allegations; (2) The trial court's determination the People's proffered gang

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[1] All statutory references are to the Penal Code unless otherwise stated.

expert qualified to testify as an expert witness was within its discretion; (3) The evidence was sufficient to sustain the jury's true findings on the gang allegations and gang-murder special circumstance; (4) Any error in the admission of evidence concerning one victim's standing in a gang was harmless; (5) The trial court did not err by instructing on flight; and (6) Defendant's trial was not rendered fundamentally unfair by the cumulative effect of errors; but (7) Defendant must be resentenced on count 2. Accordingly, we remand for resentencing on that count, but otherwise affirm.

FACTS

I

PROSECUTION EVIDENCE

The Shooting

A three-unit apartment complex stands on the northwest corner of Virginia Avenue and South Robinson, in Bakersfield. The units face east toward Robinson. There is a stop sign on Robinson at Virginia. The parking lot for the complex is at the north end of the complex, and is separated from the units' front lawn by a chain-link fence with a gate. A cement walkway leads from each of the three front doors to the sidewalk and curb running along Robinson, but the chain-link fence surrounds the yard so there is no curb access.

As of April 30, 2012, Jeffery Littlejohn, Anna Moreno, and Aaron Nash resided in apartment A, the first unit nearest the corner of Virginia and Robinson.[2] Also residing there were Katie Wimberly, her boyfriend Lynn Harris, her two-year-old daughter Ka-Mya, and her four other children.

That day, Ricardo Rivera and his friend, Raymond "Caveman" Velasquez, a Hispanic man who lived in the neighborhood, decided to walk to the store. Velasquez was wearing a black shirt Rivera had loaned him. They walked south on Robinson,

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[2] Unspecified references to dates in the statement of facts are to the year 2012.

intending to turn west on Virginia. As they reached the northernmost edge of the apartment complex's parking lot, Rivera saw a dark blue SUV (sports utility vehicle) that could have been a Tahoe or Yukon. The SUV, which was facing south, was parked at a pink house just north of Murdoch, the first street to intersect Robinson north of Virginia. Two men, who appeared to be Hispanic, were outside the SUV. They were staring in the direction of Rivera and Velasquez.

Rivera and Velasquez ignored the men and continued on toward the store. Near the corner of Virginia and Robinson, Velasquez stopped outside the fence to talk to a Black man he knew. Rivera was also on the sidewalk outside the fence, but about 10 feet north of Velasquez.

The conversation lasted five to 10 minutes, whereupon the SUV pulled up. As it was pulling up, Rivera saw the driver and someone in the front passenger seat. He could not see into the back seat, because the windows were tinted. The front windows were rolled down, however.

The SUV stopped with the passenger window next to Velasquez. Someone in the SUV asked, "hey, you guys trippin'?" Rivera did not know who said it. Rivera and Velasquez were shocked, because the phrase essentially asked whether one group was having problems with the other, and it often was associated with some kind of fight or threat. Rivera heard Velasquez talking with those in the SUV, but the exchange did not sound angry, and he heard no gang slogans. About two or three minutes after the SUV pulled up, however, Rivera saw the passenger's hand sticking out of the car. The passenger was holding a gun that appeared to be a semiautomatic. Shots were fired. Velasquez, who was seven or eight feet from the vehicle, was not hit, although the shirt Velasquez was wearing had a hole in it after the shooting that was not there when Rivera

loaned him the garment.[3] One of the bullets hit the curb or sidewalk, causing some of the cement to strike Rivera's leg. Rivera and Velasquez fled.

Sometime after the shooting, Rivera was shown a photographic lineup.[4] He was unable to identify anyone in the SUV. At trial, he testified he did not see anyone in court whom he remembered being inside the vehicle. According to Moore, who interviewed Rivera, Rivera was reluctant to tell Moore everything he knew. Rivera told Moore he saw the right front passenger lean out of the SUV. Rivera described him as a Hispanic male, with facial hair and some hair on his head that was not too long or too short. He also said the shots came from the right front seat of the vehicle, and that he saw the gun.

Harris recalled all the children, including Ka-Mya, playing in front of the apartments when he walked outside to head for his car in the parking lot. Velasquez, whom Harris knew as Caveman, was on the sidewalk outside the fence. Harris did not see any other people outside the fence, but he did see a dark blue Navigator.

Harris was at the gate when shooting started. He turned around and saw what looked like fireworks bouncing off the ground, but they were bullets ricocheting. Someone was leaning out of the car with a gun in his hand. Although the windows in the Navigator were tinted, Harris was able to see the driver and front passenger — defendant — as the vehicle drove off southbound on Robinson after the shooting. Harris did not get a good look at the driver, who was Hispanic.

Ka-Mya was lying on the ground. Harris picked her up, put her in his car, and drove off. When he saw some sheriff's deputies, he gave her over to them. Ka-Mya subsequently died from a penetrating gunshot wound of the body. The bullet entered

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3 According to Bakersfield Police Detective Moore, it was a bullet hole without a corresponding exit hole. The hole was about the size of a .45-caliber bullet. Velasquez told Moore that when he heard the shots, he moved his body, and he thought that was why there was only the one hole.

4 Each of the photographic lineups shown in this case contained defendant's photograph in the number three position.

Ka-Mya's right chest, perforated a lung and her diaphragm, perforated one of her vertebrae, and lodged in the soft tissue of the left back.

Harris was interviewed by Moore approximately eight hours after the shooting. Harris gave Moore a description of a Hispanic male who could have been bald. The man was not wearing sunglasses and did not have any piercings. Harris did not know if the man had facial hair. Harris said he was able to get a good look at the shooter's face because the shooter leaned out of the vehicle from the right front seat. Moore showed Harris a photographic lineup sometime in May. When Moore asked if Harris could identify anyone, Harris wrote "not sure." At trial, Harris explained he did so because he did not want to have to go through this. Thinking of Ka-Mya changed his mind.[5]

Littlejohn recalled standing in the grass between the first and second apartments, a couple of feet from the fence, playing with Wimberly's children. A large Hispanic male, wearing black shorts, a black shirt, and a Pittsburgh Pirates hat, walked up and stopped to talk to Harris. Harris was standing on the grass near the stop sign. The two men talked for about 10 or 15 minutes, during which time Littlejohn saw a black Ford Expedition with tinted back windows circle twice around the block. Littlejohn saw the passenger twice; he was a Hispanic man with short hair. At trial, Littlejohn identified him as defendant. Littlejohn did not get a good look at the driver.

Littlejohn saw the SUV sit for five or 10 minutes by a pink house a block away, on the corner of Murdoch and Robinson.[6] He did not see anyone get in or out of the vehicle.

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[5] Harris was in custody on unrelated matters at the time he testified. It was his understanding he would be released on his own recognizance after he testified. He was not promised anything else.

[6] Adriana Santaella, who had a child with defendant, lived in the pink house on the day of the shooting. That day, defendant dropped their child off after having her overnight. When interviewed by Moore, Santaella said defendant was the right front passenger in a blue Blazer- or Expedition-type vehicle. The only people in the car were defendant and the driver, whom she described as a "Paisa," meaning a Mexican who was not a gangster. She also told Moore that right after the shooting, Velasquez (whom she

It then drove straight down to Littlejohn's location and stopped at the stop sign. Defendant had words with Harris (who is Black) and the Hispanic male dressed in black. Defendant said, "Varrio Bakers," then fired six or seven shots a few seconds later. Although Littlejohn did not actually see when the shots were fired, he had glanced over when the men were talking, and only the right-side window was open. Only defendant was talking to the Hispanic male. Defendant was leaning forward. The Hispanic male was right in front of the passenger window, but he was standing back from the car. After the shots were fired, the SUV turned left at the stop sign onto Virginia and drove off.

Littlejohn was interviewed at the scene, and later at the police department. At the scene, he told Bakersfield Police Officer Anderberg that the vehicle involved was a blue Lincoln Navigator with four Hispanics inside, one of whom was wearing a black and gold Pittsburgh Pirates hat.[7] He also said there were two Hispanic males on the sidewalk. When shown a photographic lineup on May 19, he was unable to identify anyone. After an arrest was made, Littlejohn saw defendant's photograph in the newspaper. He knew then it was the person he had seen.

Moreno recalled that just before the shooting, she was standing in the front yard, talking on the phone. Harris was standing near the gate to the parking lot, talking to a group of three or four males. Nash was inside the apartment. Wimberly was at school.

Moreno saw a powder blue Expedition or Explorer at a pink house a block down the street. It sat there for 10 to 15 minutes, during which time Moreno did not see anyone

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identified from a photograph) and another Hispanic male ran into her yard. They demanded to know who the person was who parked in front of her house, said he had just tried to shoot them and had shot a little girl, and threatened that whoever came to her house was going to get shot. At trial, Santaella claimed the police pressured her to say things, and she had no knowledge what kind of car defendant was in when he dropped the baby off, how many people were in the car, or who was sitting where. A video recording of her interview with Moore was played for the jury.

[7] Anderberg was dispatched to the apartment complex at approximately 7:00 p.m. in response to a report of a shooting. It was still light out when the shooting occurred.

get in or out. The vehicle then started rolling up and a group of males in the car started having a conversation with someone outside the car. Two Hispanic males were walking up the street, but those in the SUV were only talking to one of them, who walked up to the vehicle. The two males had come from the direction of the pink house. Moreno could not really see who was in the SUV; the front windows were rolled down just enough for them to talk to the male outside the vehicle. The back passenger side window was down, but Moreno could not see the person in the back seat by that window because he was sitting back.

Moreno could not tell which person in the SUV was talking to the male on the street. No voices were raised; she thought the men were just having a conversation, as opposed to an argument. The conversation lasted five or six minutes, during which time the SUV was stopped at the stop sign. Suddenly, the male outside the SUV turned around, covered his head with his hands, and bent over slightly, and shots were fired at him from inside the SUV. The Hispanic males on the sidewalk were approximately eight or nine feet from the SUV. More than two shots were fired, and sparks and water flew up from the gutter. Moreno did not hear anyone yell "Varrio" before the shots were fired. The two men on the sidewalk ran off. The SUV crossed Virginia and continued on Robinson.

At the time the shots were fired, Ka-Mya was playing in the grass area directly in front of the middle apartment, roughly in the area where Littlejohn was standing. Moreno turned to get the children into the house, and saw Ka-Mya lying on the ground. She had been shot. Harris picked her up and started to drive her to the hospital.

Moore interviewed Moreno at the scene.[8] She told him she could not tell what kind of words were being said by the people involved in the shooting, but it seemed like they were friends. The only thing she heard was "Varrio somethin'," and she could not

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[8] An audio recording of the interview was played for the jury.

tell if it came from the car or the man on foot. She described the vehicle as a powder blue SUV. Shown a photographic lineup, Moreno wrote "not sure," meaning she was unable to identify anyone as having been inside the SUV. When asked at trial if she saw anybody who was inside the vehicle, she stated she did not remember what they looked like.

There was damage consistent with a bullet strike on the cinder-block wall on the north side of the apartment complex parking lot, on a mailbox in front of the apartment complex by the sidewalk for the middle apartment, and to the front wall of the middle apartment. There was also a possible bullet skip or strike to the sidewalk leading from the first apartment. This mark indicated the bullet was traveling northwest, toward the corner of the apartment complex, when it skipped. A large-caliber bullet was recovered from Ka-Mya during the autopsy. One side was flattened at a slight angle. It appeared to have hit a hard object, such as concrete. The damage to the bullet was consistent with the mark on the sidewalk.

Six expended .45-caliber shell casings were found at the scene. All were determined to have been fired from the same gun. The spent shell casings were processed for latent fingerprints and swabbed for DNA. While no prints were located, a DNA profile was obtained from the swabs. It was a mixture of at least two people, at least one of whom was male. Defendant was a major contributor to the profile.

Early in the investigation, Moore received information on a number of potential suspects. Prior to trial, nobody expressly identified defendant. During his first meeting with Velasquez, however, Moore asked Velasquez to look at the photographic lineup and see if he could identify the shooter. Velasquez's demeanor was helpful but evasive. During Moore's second contact with Velasquez, Moore asked if one of the people in the photographic array looked familiar. Velasquez was holding the page of photographs in front of his face. Moore, who was next to him, could tell he was staring at the number three position.

Moore first came in contact with defendant on July 10, and interviewed him that afternoon.[9] Defendant, who had been in Mexico when taken into custody, stated he no longer associated with the Varrio Bakers, although he was "from the neighborhood." He denied being in that neighborhood on April 30. A friend of his drove him to Mexico at defendant's request.[10] Defendant went to visit his grandfather at his grandfather's ranch, only to discover he had passed away.

Asked about the pink house, defendant said he used to go there a long time ago, to visit a friend of his from school. He did not know her name. He acknowledged she said they had a child together, but he was not sure the baby was his. He took the child one time to visit his family and friends, but had forgotten the little girl's name and the date he took her. A friend drove him, but he could not recall the friend's name or the kind of vehicle they were in. It was not an SUV, however; although defendant did not drive, he was always either in a Mercedes or a red Mustang. After dropping the baby off, defendant — who was in the passenger seat as always — and the driver turned back around. Defendant did not exchange words with anyone. Defendant denied knowing anything about what happened or that the police were looking for him; he did not watch television, and he had a new phone when he went to Mexico. He denied being present at the shooting.

The Gang Evidence

Moore had been an officer with the Bakersfield Police Department since 1996, and a law enforcement officer for several years before that. He was one of the officers who dealt with gang neighborhoods and gang arrests before the police department had a gang unit.

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9 A video recording of the interview was played for the jury.

10 Defendant was coming back into the United States from Mexico when he was contacted by a law enforcement agency. He was taken into custody by Calexico police on a murder warrant in this case.

Moore explained that the Varrio Bakers gang is a group of people who are loosely associated with Southerner gangs. The Varrio Bakers are known to commit murders, robberies, burglaries, and crimes that support the gang generally. The location of the shooting in this case was within Varrio Bakers territory.[11]

Moore explained that tagging is a way gangs mark their territory. Varrio Bakers commonly use "VB" and "VBKS." They also use "3" and "X3," which relate to 13 and the fact the Varrio Bakers are correlated with Southerner street gangs. A lot of Southern street gangs use 13 to show allegiance to the Mexican Mafia prison gang. At the time of the shooting, there was Varrio Bakers tagging on an abandoned building on the northeast corner of Virginia and South Robinson, and also on a wood fence along Virginia, just to the west of the scene. At the time Moore interviewed defendant, defendant had a large VB tattoo visible on the top of his head.[12] Defendant did not, however, have any gang convictions.

Moore explained that Southern gangs have rules against their members shooting from vehicles, because unintended victims can be killed. There are also rules about killing children, because they are innocent and not part of the gang lifestyle. The crime in this case violated those rules. This led to the police receiving more assistance from people than they normally would get in a regular gang killing. Even so, it was difficult to gain cooperation from some of the witnesses. Snitching — helping the police — also violates gang rules and can result in one getting killed.

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11 The area was also in the territory of the Eastside Crips, a Black gang.

12 During the interview, defendant gave the address of his father's house and said defendant had always used it as his address. The address was in the territory of Loma, another Hispanic street gang. According to Moore, it was not "out of bounds" for a family member of one gang to reside in the area of another gang.

Moore explained that mere membership in a gang is not illegal, but conduct in association with gang activity can be. The conduct has to further the street gang's operations or somehow benefit the gang.

On September 12, 2005, Bakersfield Police Officer Woolard came in contact with defendant during a traffic stop. Among his tattoos, defendant had "Varrios" tattooed on his chest. Defendant said he had had the tattoo shaded in about two months earlier, while he was intoxicated.

On September 16, 2011, Bakersfield Police Detective Sherman assisted a parole officer in arresting Anthony Hernandez, a Varrio Bakers gang member with the moniker "Green Eyes." Hernandez and defendant were found inside a house. Defendant was underneath the covers in one of the back bedrooms.

On June 7, 2012, Bakersfield Police Officer Littlefield came in contact with Alfred Herrera, a Varrio Bakers member who was older than the typical 18- to 25-year-old members with whom police normally had contact. During the course of their conversation, Herrera said he was familiar with the current case involving defendant. Herrera said Velasquez was a member in bad standing with the Varrio Bakers.

Deputy King, of the Kern County Sheriff's Department detention bureau, had been a classifications deputy for approximately 14 years. He explained that in jail parlance, a "kite" is a handwritten note by which jail inmates communicate with each other. Kites generally are passed hand to hand.

King knew defendant, who was housed in unit 2 of C pod at the Lerdo pretrial facility. A handwritten note was seized that read "Chacón VBKS" near the signature line. The note contained housing information for what it termed the "C-2 Active Homies." Two of the names listed were "Chacón VBKS" and "Kave-man Colonia Bakers." The note also bore "the Kanpol," a common symbol used by Southern Hispanic criminal street gang members. It is two lines or bars, each of which represents five, and then three dots. It is a Mayan numeral 13 used to show allegiance to the Mexican Mafia.

In April 2014, King came into possession of another kite. This note was what inmates refer to as a "roll call." In a roll call, all active members have to supply their name, booking number, date of birth, neighborhood with which they associate, and moniker to the member of the criminal street gang or prison gang who runs that specific housing unit. That person is appointed by an influential member of the specific gang, in this case, the Southern Hispanics, also known as Sureños. Velasquez, who was in custody, put his identifying information, including his booking number, on this kite, along with his moniker, "Caveman." He identified with the Varrio Bakers criminal street gang.

As of the time of trial, Bakersfield Police Officer Malley had been a peace officer for seven and a half years, and had been in the gang unit — his current assignment — about a year and a half.[13] Prior to that, he worked in the patrol division. He received training on criminal street gangs while in the police academy in 2006.[14] After he graduated from the academy, he went into a field training program, where he was under the supervision of a more senior officer. His field training officers had both been in the gang unit at some point. While in the field training program, Malley had frequent contact with individuals believed to be members of criminal street gangs. Malley was taught about indicia of gang membership, gang territories, gang rivalries, and the like.

After he completed his field training, Malley was placed on probationary officer status for a year, then hired as a permanent employee. While on probation, he was on

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13 Because defendant challenges Malley's qualifications as an expert, we set out the pertinent testimony in some detail.

14 Malley received 14 hours of classroom-level training, which included gang identifiers, common signs and symbols, tattoos, information about monikers, traditional boundaries, and the types of crimes gang members commit. It also included a tour of the various gang neighborhoods of Bakersfield. The course was taught by a senior police officer in the special enforcement (gang) unit. As of the time of trial, that officer was a sergeant in the gang unit.

patrol and had contact with individuals he believed were gang members almost on a daily basis. One of the beats he worked encompassed the area of Virginia and South Robinson. During his time on that beat, he contacted suspected gang members at least several times a week. When he became a patrol officer, he was assigned to the same general area. After he was hired as a permanent employee, and as a member of the gang unit, Malley received additional training in criminal street gangs.[15]

Malley believed the Varrio Bakers started in the 1950's or thereabouts, although he did not know the exact year. They began in the central eastern portion of Bakersfield. He did not know the founding member's name. He did not know the exact membership number as of the time of trial, because it was constantly changing, but knew the gang had somewhere about 100 and 1,000 members. Malley had heard from various sources that Richard "Puppet" Luevano was running the Varrio Bakers as of the time of trial. Malley did not know, however, who the "shot-callers" of the Varrio Bakers were on the date of the shooting.[16]

Malley, who had never before testified as an expert on the Varrio Bakers although he had testified concerning several other Sureño and local street gangs, explained that

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[15] In 2008, Malley attended an eight-hour refresher course, given by the Bakersfield Police Department's special enforcement unit. In 2012, he attended a four-day (40-hour) gang awareness instruction course, which was given by the Bakersfield Police Department, the California Department of Corrections and Rehabilitation, and the Kern County District Attorney's Office. In 2013, he attended a four-day (40-hour) National Gang Investigators Association conference held in Anaheim, which contained information on local street gangs and street gangs in Southern California, including Crip and Sureño criminal street gangs. He had also read two books — *A Guide to Understanding Street Gangs*, by Dr. Al Valdez, and *The Mexican Mafia Encyclopedia*, which was written by two former Mexican Mafia gang members. Both books were specific to Crips and Sureños. There was information in the latter book that referenced local Sureño street gangs by name.

[16] Malley explained that a shot-caller within a gang is someone who has a tremendous amount of respect and power, and controls members with less status. The shot-caller controls other members' activities.

there is a gang called Southerners or Sureños that encompasses the Varrio Bakers. It is a gang as a whole, and is a combination of all other subsets, of which the Varrio Bakers is one. He explained that a crime done for the benefit of the gang can be any crime committed by a gang member that benefits either the status of the gang within the gangs in Kern County, or benefits the reputation of the gang and basically instills fear into members of the community. Although the killing of a two-year-old child will not enhance a single gang member's status within the particular gang, it will enhance that gang's reputation in the community as being ruthless and having the ability to kill people.

During his time on patrol and in the gang unit, Malley participated in investigations in which members of the Varrio Bakers were identified as potential suspects. He also investigated incidents in which they were potential victims or witnesses. He had arrested members of the Varrio Bakers, conducted formal interrogations of them, and also talked with members consensually. Consensual conversations allowed him to gather information about the gang and the particular gang member, and to expand his knowledge base concerning the gang. It also allowed him to corroborate information he had received from other people about a certain gang. In addition, Malley had read reports involving the Varrio Bakers, and spoken with quite a few other officers about them.

Based on his training and experience, Malley opined that some of the primary criminal activities of the Varrio Bakers are shootings, assaults with deadly weapons, firearms possession, murder, attempted murder, robbery, carjacking, sales of narcotics, and witness intimidation. Malley also related that there are different levels of respect within a gang. The shot-caller has the most respect; someone who steals things or sells narcotics has the least amount, although this does not mean that person is in bad standing with the gang. Malley explained that respect is very important to the Varrio Bakers. In the gang culture, fear is often seen by gang members as being equal to respect, and it is the way they establish dominance. They gain respect from members of the community

and other gangs by instilling fear into them. The more violent the types of crimes a gang member commits, the more respect that person commands within the gang. By contrast, a gang member loses respect by failing to complete an assigned task, backing down from rival gang members, or showing weakness, particularly in front of other members of the person's gang. There are disciplinary procedures that occur within the gang; discipline can consist of someone being "checked" or beaten, and it can even consist of a member being killed if a shot-caller deems it necessary for whatever issue that needs to be settled.

Malley was familiar with the corner of Virginia and South Robinson. It is within Varrio Bakers territory, which traditionally extends from Eye Street on the west to Washington Street on the east, and from East Brundage Lane on the south to East Truxton Avenue on the north. Malley had seen a lot of graffiti. "VB" and "VBKS" signify Varrio Bakers. "X3" signifies 13. Varrio Bakers members often have tattoos. Defendant had gang tattoos, including "Varrio" across his chest; "VBKS" across the back of his neck; "KC," which local Sureño gang members often wear as a sign of pride at being a gang member from Kern County, on his right forearm; and a Kanpol — three dots with two lines underneath, signifying the number 13 — on his left ring finger. Defendant also had an "805" tattoo. This is the former area code for Bakersfield. Malley explained that older gang members tend to have this tattoo rather than "661," the current area code. Malley believed it likely defendant obtained that tattoo a long time ago. None of defendant's tattoos were fresh.

Malley reviewed street checks and offense reports regarding defendant.[17] One was Sherman's November 2011 report, which documented defendant being contacted with Anthony Hernandez. Hernandez was a previously admitted member of the Varrio Bakers, and a registered gang offender with that gang. Malley also reviewed an offense

[17] Malley described a street check as a police officer's documentation that does not contain information regarding an arrest. It can be for anything the officer feels needs to be put on paper for future reference.

report in which defendant was contacted on April 19, 2012, with Jose Concepcion Lopez. Malley had had previous contacts with Lopez, who was a documented Varrio Bakers and a registered gang offender with that gang. Malley also reviewed Woolard's 2005 report regarding defendant. Although Malley had not had any contact with defendant, he had talked with other officers about defendant.

Based on his conversations with other officers and review of the foregoing information, Malley opined defendant was an active member of the Varrio Bakers criminal street gang at the time of trial, and was an active member in April 2012. Malley based this opinion on his experience as a patrol officer and gang investigator, and on the fact defendant was contacted within the traditional boundaries of the gang on several occasions, was known to associate with other documented members of the gang, and had tattoos on his body that only a member of that gang could obtain. Malley acknowledged, however, that a person could age out of the gang. He had spoken with members who said they had grown out of being gang members, but could still return to the neighborhood and socialize with active members. Malley had no evidence defendant had aged out. Defendant had no gang convictions and had never been ordered to register as a gang offender, however.

Malley also reviewed information concerning Velasquez, although he had never had contact with him. After reviewing the same kind of information he reviewed for defendant, Malley opined Velasquez was an active member of the Varrio Bakers criminal street gang.

Malley reviewed what are commonly called predicate offenses. On January 24, 2012, when documented Varrio Bakers Jose Trejo, Roman Serna, and Miguel Bravo were contacted, Serna fled and discarded a firearm. When apprehended, he was found to have 14 bindles of suspected methamphetamine on his person. All three admitted they were Varrio Bakers. Trejo later pled no contest to possession of a controlled substance for sale and gang participation, and was sentenced to prison. Trejo was an active member of the

Varrio Bakers at the time of the offense. Malley, who had had contact with Trejo, knew him to have "BKS" tattooed on his chest.

On July 29, 2011, documented Varrio Bakers Ronnie Garcia and an unidentified subject forced their way into an apartment and brandished a firearm. They made a female stay in a bedroom while they took property from the residence. Garcia, who ultimately pled no contest to robbery and was sentenced to prison, had tattoos of "KC" on his neck, "100-percent goon" on his head, and "Bakers" on his back.[18] Although Malley had not had any contact with Garcia, he had reviewed the information on him and talked to other officers about him, and opined he was an active member of the Varrio Bakers at the time of the offense.

On August 27, 2010, officers contacted Anthony Hernandez and George Mendoza, both Varrio Bakers, walking together. During a probation search, Hernandez was found to have a large quantity of methamphetamine on his person, as well as cell phones, a pay-and-owe sheet, and currency. During a parole search at Mendoza's residence, gang writings for the Varrio Bakers Traviesos subset were located. Hernandez pled no contest to gang participation and was sentenced to prison. Although Malley had not had contact with Hernandez, he had reviewed information on him and spoken to officers about him. Malley opined Hernandez was an active member of the Varrio Bakers at the time of the offense.

On April 22, 2010, Jesus Ramirez and Zane Hubbard, who had "VB" tattooed on his face, carjacked and kidnapped a victim. Ramirez was convicted of kidnapping for robbery, kidnapping during a carjacking, assault with a firearm, criminal threats,

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[18] Malley explained that when someone from outside the Varrio Bakers refers to a Varrio Bakers as a goon, it is a sign of disrespect. However, a lot of Varrio Bakers — particularly the younger ones — have been getting "goon" or "100-percent goon" tattooed on their bodies as a gang identifier. Malley had contact with someone the day he testified who was a Varrio Bakers and had "100-percent goon" tattooed across his knuckles.

victim/witness intimidation, felon in possession of a firearm, and gang participation, and sentenced to prison. Malley had had no contact with Ramirez, but had talked to other officers about the case and to officers who knew Ramirez. Malley opined Ramirez was an active member of the Varrio Bakers at the time of the offense.

On February 20, 2010, officers attempted to stop a stolen vehicle that was occupied by Varrio Bakers Jaime Aguirre, Anthony Perez, and Juan Oregon. A vehicle pursuit ensued, during which shots were fired at officers from inside the vehicle. Oregon subsequently was convicted of attempted murder and assault with a deadly weapon on a police officer and sentenced to prison. Malley participated in the search for the vehicle's occupants after the pursuit, although he never met Oregon. He reviewed information on and talked to officers about Oregon, and opined he was an admitted member of the Varrio Bakers at the time of the offense.

In response to a hypothetical question based on the evidence presented by the prosecution in the present case, Malley opined that the shooting was done for the benefit of and in association with the Varrio Bakers. He explained the shooting benefitted the gang, because people heard the gang name yelled. This would intimidate members of the nearby community. It would also intimidate members of law enforcement to know individuals were possessing firearms and roaming through their own territory, conducting business by shooting members of their own gang. The association came into play because it was a crime committed within the traditional boundaries of the gang, and a person yelling "Varrio" was basically claiming they were the gang responsible for the shooting. It was "kind of their calling card." Malley acknowledged a member of a street gang could commit a crime — even murder — that was not for the benefit of the gang.

II

DEFENSE EVIDENCE

Suzanna Ryan, a forensic DNA consultant, reviewed various materials, data, and reports concerning the DNA analysis conducted in this case. She noted the stained areas

from the swabs from the shell casings — the areas likely rubbed on the casings — were consumed in testing. Based on her training and experience, retention of some of the sample is important so that it can be retested by the opposing side. The defense was deprived of that ability in this case.

Ryan was concerned by the fact the samples from the six shell casings were combined.[19] Combining samples makes it impossible to know the origin of the DNA profile. In this case, it could not be determined whether the DNA profile that was eventually developed came from one casing, more than one casing, or all six casings.

Ryan also noted the shell casings were tested for fingerprints. Latent print powders and brushes can transfer DNA. Even though a disposable brush was used in this case, the fact the same brush was used on all six casings could transfer DNA from one casing to another. This conceivably could make it look as if a person touched all six casings, when he or she only touched one. Moreover, there was no real way to tell when DNA was applied to the casings. Touching casings does not mean someone fired a gun, and the casings could have been touched two weeks before the shooting.

Ryan explained that being a major or minor contributor has nothing to do with who touched an item last, but rather with the amount of DNA found. Ryan agreed that in this case, the DNA analysts correctly matched the major contributor to the known reference sample from defendant. In Ryan's opinion, the minor contributor was present at a level sufficient for a search of the state DNA database. This was not done.

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19 Although the Bakersfield Police Department crime scene unit laboratory technician who processed the shell casings for DNA used a separate swab for each casing, the criminalist from the Kern Regional Crime Laboratory who performed the DNA analysis combined the swabs because a swab from a single shell casing may not contain enough DNA to give a complete DNA profile.

DISCUSSION

I

SEVERANCE/BIFURCATION OF GANG ALLEGATIONS

Defendant contends the trial court abused its discretion and violated due process by refusing to bifurcate the gang allegations. He says the main issue at trial was the shooter's identity, which the gang evidence was irrelevant to prove; to the extent gang evidence was relevant to prove motive, motive was only relevant to the gang enhancements, and the motive that was supposedly central to the murder charge was based on inadmissible hearsay. He further argues any possible relevance of the gang evidence to the substantive charges was far outweighed by the likelihood of prejudice. We conclude the trial court did not err.

A. Background

As previously described, defendant was charged, in count 4, with active participation in a criminal street gang. (§ 186.22, subd. (a).) Counts 1 through 3 carried gang enhancement allegations (*id.*, subd. (b)(1)), and a gang-murder special circumstance was alleged as to count 1 (§ 190.2, subd. (a)(22)). Defendant moved, in limine, for bifurcation of the gang allegations. Stripped of all nonessentials, his position essentially was that under the circumstances of this case, gang testimony would be "cancerous," while having little probative value as to the actual issues. The People opposed the motion, arguing gang status had been injected into the crime by someone yelling "Varrio" before shots were fired; accordingly, gang status was relevant and admissible as to motive and identity. That being the case, the jury would hear at least some of the evidence even if bifurcation were ordered. After further argument in which defense counsel argued the evidence was far more prejudicial than probative and would effectively lower the People's burden of proof, the trial court found the offenses and allegations were properly joined under section 954; the evidence was cross-admissible; the gang involvement was relevant to motive, malice, premeditation, and intent; and,

under Evidence Code section 352, the probative value outweighed any prejudicial impact because of the intertwinement of the gang involvement with such issues. Accordingly, it denied the motion.

B. Analysis

Throughout the course of this case, the parties have not always distinguished between bifurcation and severance. Technically speaking, substantive counts are severed, while enhancement allegations are bifurcated. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 946, fn. 5.)

Turning first to the legal principles applicable to severance, there is no dispute the offenses charged in the present case satisfied the statutory requirements for joinder. (§ 954; *People v. Burnell*, *supra*, 132 Cal.App.4th at p. 946.)[20] " 'The law prefers consolidation of charges. [Citation.]' " (*People v. Manriquez* (2005) 37 Cal.4th 547, 574.) "When, as here, the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion. [Citations.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 160-161.) In exercising its discretion, the trial court "weighs 'the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial. [Citation.]' [Citation.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 37.) In determining whether the trial court abused its discretion, we consider the following factors: "(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citation.]"

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[20] Section 954 provides, in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, . . . under separate counts . . . ."

(*People v. Mendoza, supra,* 24 Cal.4th at p. 161.) The burden is on the defendant to establish the trial court's ruling exceeded the bounds of reason, all of the circumstances being considered. (*People v. Merriman, supra,* 60 Cal.4th at p. 37; *People v. Giminez* (1975) 14 Cal.3d 68, 72.)

A determination the evidence was cross-admissible "ordinarily dispels any inference of prejudice. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 28.) " '[T]he issue of cross-admissibility "is not cross-admissibility of the charged offenses but rather the admissibility of relevant evidence" that tends to prove a disputed fact. [Citations.]' [Citation.]" (*People v. Capistrano* (2014) 59 Cal.4th 830, 849.) Complete (so-called two-way) cross-admissibility is not required (*ibid.*), while " 'the absence of cross-admissibility does not, by itself, demonstrate prejudice. [Citation.]' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 856.) "The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence. [Citation.]" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284.)[21]

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21 For example, in *People v. Ewoldt* (1994) 7 Cal.4th 380, 403, the California Supreme Court stated that where admission of evidence under Evidence Code section 1101, subdivision (b) is concerned, "[t]he greatest degree of similarity [between the charged and uncharged acts] is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" The burden is on the People, as the proponent of the evidence, to persuade the trial court the similarities are sufficient to meet this standard, and that the potential prejudice from jurors becoming aware of the uncharged misconduct is outweighed by the probative value of the evidence. (*People v. Soper* (2009) 45 Cal.4th 759, 772.) Where severance is concerned, by contrast, the burden is on the party seeking severance " 'to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citations.]' " (*Id.* at p. 773.) " 'That the evidence would otherwise be inadmissible [under Evidence Code section 352] may be considered as a factor suggesting possible prejudice, but countervailing considerations [of efficiency and judicial economy] that are not present when evidence of uncharged offenses is

An appellate court evaluates claims a trial court abused its discretion by denying a motion for severance "in light of the showings made and the facts known by the trial court at the time of the court's ruling. [Citations.]" (*People v. Merriman, supra,* 60 Cal.4th at pp. 37-38.) Even if the ruling was correct when made, however, reversal will be required if "the joint trial resulted in such gross unfairness as to amount to a due process violation. [Citation.]" (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 853.)

Turning to bifurcation, section 1044 gives a trial court discretion to bifurcate proceedings. (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75.)[22] With respect to whether bifurcation of gang enhancement allegations generally should be ordered, the California Supreme Court has distinguished between a prior conviction allegation, which relates to the defendant's status and may have no connection to the charged offense, and a criminal street gang allegation, which "is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) Because of this difference, less need for bifurcation of a gang enhancement allegation usually exists. (*Ibid*.)

This does not mean bifurcation should never be ordered, however. (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049.) "The predicate offenses offered to establish a 'pattern of criminal gang activity' [citation] need not be related to the crime, or even the

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offered must be weighed in ruling on a . . . motion [to sever properly joined charges].' " (*Ibid*.) Moreover, the question, where cross-admissibility is concerned, is not necessarily whether the offenses share sufficient distinctive common marks to be cross-admissible to establish the perpetrator's identity, but whether there is "circumstantial cross-linking of the evidence" such that the evidence relevant to one offense would be admissible, in a separate trial of the other offense, as circumstantial evidence tending to prove the defendant was the perpetrator. (*People v. Johnson* (1988) 47 Cal.3d 576, 589-590.)

[22] Section 1044 provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt. [¶] In cases *not* involving the gang enhancement, [the Supreme Court has] held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation — including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like — can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.)

The court went on to say that "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself — for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged — a court may still deny bifurcation." (*People v. Hernandez, supra,* 33 Cal.4th at p. 1050.) The court analogized the issue to the severance of charged offenses, in which judicial economy is a factor to be considered. (*Ibid.*) While recognizing the analogy "is not perfect" (*ibid.*), the court concluded "the trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged. [Citation.]" (*Ibid.*)

Our state high court has observed that "[a]lthough evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged — and thus should be carefully

scrutinized by trial courts — such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; see *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193 [applying same principles to gang evidence generally].)

In the present case, the active participation charge was based on other offenses committed at the same time.[23] (See *People v. Burnell*, *supra*, 132 Cal.App.4th at p. 946 [noting appellate court's failure to find any case in which joinder of active participation count with trial of other offenses committed at same time was held to be prejudicial error].) It is true there was no evidence of *intergang* rivalry or retaliation, as is often seen in cases in which evidence of gang membership or activity is relevant to motive. (See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 654-655; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1194-1195.) Nevertheless, and contrary to defendant's assertions, at least some of the gang evidence was relevant to show defendant's motive for attacking Velasquez. "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167; accord, *People v. Ruiz* (1998) 62 Cal.App.4th 234, 239-240.) Since the evidence was relevant to motive, it was also inferentially relevant to identify defendant as the shooter. (See, e.g., *People v. Williams* (1988) 44 Cal.3d 883, 911; *People v. Daniels* (1971) 16 Cal.App.3d 36, 46 & cases cited ["It is elementary, evidence of motive to commit an offense is evidence of the identity of the offender."].) The evidence was also probative of intent to kill and premeditation. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 707, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Martin* (1994) 23 Cal.App.4th 76, 81-82.) These matters clearly were at issue in the case, even apart from establishment of the shooter's identity. As a result, at least some of the evidence would have been admissible

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23 The amended information alleged all charges occurred on or about April 30, 2012.

even if the gang charge and allegations had been tried separately. (See, e.g., *People v. Montes* (2014) 58 Cal.4th 809, 859; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) "There was no need for, and in fact, no reasonable way to bifurcate the . . . allegation[s]." (*People v. Martin, supra*, 23 Cal.App.4th at p. 82.)[24]

In light of the foregoing, defendant has failed to establish the trial court abused its discretion by refusing to sever the gang charge and/or bifurcate the gang enhancement and special circumstance allegations. (See *People v. Mendoza, supra*, 24 Cal.4th at pp. 161-162; *People v. Burnell, supra,* 132 Cal.App.4th at pp. 947-948.)

Nor has defendant shown a unified trial "resulted in such gross unfairness as to amount to a due process violation. [Citation.]" (*People v. Capistrano, supra,* 59 Cal.4th at p. 853; see *People v. Albarran* (2007) 149 Cal.App.4th 214, 232.) We recognize evidence of gang membership has a "highly inflammatory impact" (*People v. Cox* (1991) 53 Cal.3d 618, 660, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22) and "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense[s] charged" (*People v. Carter, supra,* 30 Cal.4th at p. 1194). The same is true of gang-related evidence, particularly regarding criminal activities. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) Here, however, the gang evidence was no more inflammatory than the evidence related to the other charged offenses, and no evidence of uncharged criminal activity by defendant was admitted. Likewise, the predicate offenses were not unduly inflammatory. Significantly, jurors were instructed they could not infer bad character or

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[24] Defendant seems to suggest the trial court was required to find the gang evidence relevant to prove, and more probative than prejudicial with respect to establishing, the shooter's identity, before it properly could deny severance/bifurcation. We know of no such requirement.

criminal disposition from the gang evidence. The instruction cured any potential prejudice. (See *People v. Homick* (2012) 55 Cal.4th 816, 866-867; *People v. Samaniego, supra*, 172 Cal.App.4th at p. 1168; see also *People v. Jones* (2013) 57 Cal.4th 899, 927 [where jury fails to convict on some charges, reviewing courts are "confident" jury differentiated among defendant's crimes].)

II

QUALIFICATIONS OF PEOPLE'S GANG EXPERT

Defendant contends the trial court abused its discretion by allowing Malley to testify as an expert on the Varrio Bakers. Defendant complains that while Malley may have understood the generic workings of gangs, he was insufficiently familiar with the gang whose activities were the focus at trial. Defendant says the trial court's admission of testimony from a purported expert who was actually unqualified violated defendant's federal constitutional right to be convicted only on the basis of reliable evidence. We find no error.

A. Background

As part of his in limine motion to bifurcate and limit gang evidence, defendant requested an Evidence Code section 402 hearing concerning the People's gang expert and the scope, content, and purpose of that witness's proposed testimony.[25] For their part, the People moved, in limine, to introduce expert gang testimony.

An Evidence Code section 402 hearing was held, in part on the issue whether Malley qualified as an expert. At the hearing, Malley testified concerning his training, experience, and knowledge of gangs in general, the Varrio Bakers in particular, and defendant, consistently with his testimony at trial, *ante*. In addition, Malley testified that

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[25] Defendant also requested a *Kelly-Frye* (*People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. U.S.* (D.C. Cir. 1923) 293 F. 1013) hearing with respect to the People's proposed expert opinion evidence. Defendant does not repeat his *Kelly-Frye* claims on appeal.

the Okie Bakers, Colonia Bakers, and Norteños were the Varrio Bakers' enemies; and the Loma Bakers, a gang in the northeastern area of Bakersfield, traditionally were not enemies of the Varrio Bakers. He also testified he had not had any papers published on gangs and had not taught any courses on the subject. He was not an expert in Vietnamese, White, or outlaw motorcycle gangs, although he was an expert on African-American gangs in Kern County. Although Malley had never before heard the term "in the hat," he knew the term "green light" was when a hit or an order to kill somebody was issued. Malley also testified that "street cred" refers to the amount of respect someone commands on the streets for acts that person does. Asked if street cred goes up or down if someone kills a two-year-old, Malley responded he had talked to gang members who said it does not go up; however, they also said the amount of fear the gang commands on the street increases.

Malley testified that in preparation for this case, he spoke with investigating officers, and reviewed documentations and police reports concerning the incident and defendant's gang membership. Malley also testified that he talked to members of criminal street gangs on a daily and weekly basis, and talked to members of the Varrio Bakers almost daily. The last time he had contact with one was his last duty day, which was three days before he testified. Some of his conversations with Varrio Bakers occurred while the individuals were in custody, while others took place during consensual contacts. The purpose of consensual contacts with gang members is to gather gang-related intelligence. The information is documented, and is usually corroborated at a later time. It is not taken at face value.

In pertinent part, the defense argued Malley did not have sufficient knowledge, training, education, or experience to qualify as an expert on the Varrio Bakers. The prosecutor responded that an expert need only have special training and experience beyond that of a normal person, and that Malley knew things normal people did not. Defense counsel countered that Malley knew more than regular people by virtue of being

a police officer, but that did not make him an expert, as he did not know anything more than what all police officers know. The court ruled:

> "We look at the officer's seven and a half years as a peace officer, one year and four to five months as a gang officer, a year to several months extra duty as a gang officer.
>
> "And kind of in reverse order I look at Evidence Code Section 801, which provides expert opinion testimony is admissible only if the subject matter of the testimony is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact and is based on matter than an expert may reasonably rely on in formulating an opinion on the subject to which his or her testimony relates.
>
> "I find that based on his testimony and a review of the CV that [Malley] has prepared . . . . [¶] . . . [¶] . . . I find that based on all of the foregoing and the testimony of the officer, that he does have special knowledge, skill, experience, training, and education in a particular field, gang suppression, to qualify as an expert witness and to give testimony in the form of an opinion on those matters under Evidence Code Section 720. Find that he is so certified."

B. <u>Analysis</u>

"Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citation.] The subject matter of the culture and habits of criminal street gangs . . . meets this criterion. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 617, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).)

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." (*People v. Bloyd* (1987) 43 Cal.3d 333, 357; see Evid. Code, § 720, subd. (a).) "Whether a person qualifies as an expert in a particular case . . . depends upon the facts of the case and the witness's qualifications. [Citation.]" (*People v. Bloyd*, *supra*, at p. 357.) " 'The competency of an expert is relative to the topic and

fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.' [Citation.]" (*Kelly, supra,* 17 Cal.3d at p. 39; see *People v. Hogan* (1982) 31 Cal.3d 815, 853, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

"The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. [Citations.] That discretion is necessarily broad . . . . Absent a manifest abuse, the court's determination will not be disturbed on appeal. [Citations.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.) "The trial court's ' "decision will not be reversed merely because reasonable people might disagree." ' " (*Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 537.) " ' "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility." ' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 322.)

In light of the " 'considerable latitude' " afforded a trial court in determining the qualifications of an expert (*People v. Cooper, supra,* 53 Cal.3d at p. 813), we cannot say the trial court abused its discretion in permitting Malley to testify as an expert on criminal street gangs in general and the Varrio Bakers in particular. "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness ' " '*clearly lacks* qualification as an expert.' " ' [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 162.) Here, although the defense focused at trial on Malley's relatively small amount of formal gang training, Malley had a considerable amount of on-the-job experience with gangs and gang members, particularly the Varrio Bakers. Under the circumstances, the trial court properly allowed him to testify as an expert. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 861; *People v. Valadez* (2013) 220 Cal.App.4th 16, 29.) Questions concerning the degree of his knowledge and reliability of his testimony were explored at length before the jury, and went to the weight of the evidence

rather than its admissibility. (*People v. Merriman*, *supra*, 60 Cal.4th at p. 57; *People v. Bolin*, *supra*, 18 Cal.4th at p. 322.)

Having concluded the trial court did not abuse its discretion in allowing Malley to testify as a gang expert, we find no merit in defendant's claim admission of the testimony violated his federal constitutional right to be convicted only on the basis of reliable evidence. (See *People v. Nelson* (2016) 1 Cal.5th 513, 537.) As the United States Supreme Court has stated, "The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, [citation]; compulsory process, [citation]; and confrontation plus cross-examination of witnesses, [citation]. Apart from these guarantees, . . . state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial. [Citation.] Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' [citation], have we imposed a constraint tied to the Due Process Clause. [Citation.]" (*Perry v. New Hampshire* (2012) 565 U.S. 228, 237.) We find no such unfairness here.

III

SUFFICIENCY OF THE EVIDENCE

Defendant contends the evidence was insufficient to support the gang allegations and gang-murder special circumstance.[26] We disagree.

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26 At one point in his opening brief, defendant says the evidence failed to prove the elements of the gang allegations *and substantive offense* beyond a reasonable doubt; accordingly, the section 186.22, subdivision (b) allegations and gang-murder special circumstance must be reversed. To the extent elements of the substantive offense (§ 186.22, subd. (a)) impact the gang-murder special circumstance, we will address

A. Standard of Review

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson*, *supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) Rather, reversal for insufficient evidence "is unwarranted unless it appears 'that upon *no hypothesis whatever* is there sufficient

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them. We will not, however, address the sufficiency of the evidence to prove that offense itself, since defendant was acquitted of that charge. As defendant implicitly recognizes, any inconsistency between that acquittal and the jury's true finding on the gang-murder special circumstance does not, of itself, affect the validity of the special circumstance finding. (See *People v. Avila* (2006) 38 Cal.4th 491, 600.) Moreover, as defendant does not challenge the sufficiency of the evidence to support the drive-by special circumstance (§ 190.2, subd. (a)(21)), we question how any impropriety with respect to the gang-murder special circumstance can have harmed him. Once a single special circumstance allegation was found true, imposition of a sentence of life in prison without the possibility of parole was mandatory. (*Id*., subd. (a).)

Much of defendant's argument is based on the claim Malley was unqualified to testify as a gang expert and to offer opinions about the Varrio Bakers. Because we have concluded the trial court did not abuse its discretion by permitting him to so testify, we do not further address this prong of defendant's argument.

substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331, italics added.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125), and applies to enhancements and special circumstances as well as to substantive offenses (*People v. Wilson* (2008) 44 Cal.4th 758, 806 [enhancements]; *People v. Ochoa* (1998) 19 Cal.4th 353, 413-414 [special circumstances]).

B. Gang Enhancement Allegations

To subject a defendant to the penal consequences of the gang enhancement set out in section 186.22, subdivision (b)(1), "the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citation.] In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. [Citation.]" (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 616-617, italics omitted.)

In order to prove the elements of this enhancement, the People may present expert testimony on criminal street gangs, as they did in this case. (*People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1047-1048; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) However, "[a] gang expert's testimony alone is insufficient to find an offense gang related. [Citation.] '[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a

finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.' [Citation.]" (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657; see *People v. Vang* (2011) 52 Cal.4th 1038, 1046; *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567-1568.)

The record in the present case presents an underlying evidentiary foundation for Malley's opinion the shooting was committed for the benefit of the Varrio Bakers, particularly the evidence defendant had Varrio Bakers tattoos, the shooting was committed in traditional Varrio Bakers territory, and defendant yelled the gang's name just before the shooting. Assuming this evidence was credited — a matter for the jury's determination — a reasonable juror also could infer the shooting was committed with the specific intent to promote or further criminal conduct by gang members, even assuming defendant acted alone. (See, e.g., *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139 (lead opn. of Corrigan, J.); *id*. at pp. 1140-1141 (conc. opn. of Baxter, J.); *People v. Albillar* (2010) 51 Cal.4th 47, 63-64; *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261-1262; *People v. Mendez* (2010) 188 Cal.App.4th 47, 56-57; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931; cf. *People v. Rios* (2013) 222 Cal.App.4th 542, 574; *People v. Ramon* (2009) 175 Cal.App.4th 843, 849-851.)

Defendant contends, however, that the prosecution failed to establish the Varrio Bakers' primary activities were any of the crimes listed in subdivision (e) of section 186.22. In this regard, Malley testified some of the group's primary activities were shootings, assaults with deadly weapons, firearms possession, murder, attempted murder, robbery, carjacking, sales of narcotics, and witness intimidation. These activities are listed in section 186.22, subdivision (e), and defendant does not contend otherwise. Instead, he says Malley "failed to explain any competent foundation or basis for" his opinion those were the Varrio Bakers' primary activities.

"[E]vidence of either past or present criminal acts listed in subdivision (e) of section 186.22 is admissible to establish the statutorily required primary activities of the

alleged criminal street gang." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Although such evidence is not necessarily sufficient to prove "the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations" (*ibid*.), "[s]ufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley*, *supra*, 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.] The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]" (*Id.* at p. 324.)

In the present case, Malley, who had been a peace officer for over seven years, had worked at least in part in Varrio Bakers territory since he was a probationary officer. He had participated in investigations in which Varrio Bakers were suspects, victims, and witnesses. He had arrested, interrogated, and held consensual conversations with members of the group. He had also read reports involving, and spoken to quite a few other officers about, Varrio Bakers. It is readily apparent his testimony concerning the group's primary activities was based on the foregoing. (See *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107.) This evidence was sufficient. (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1033, 1068; *People v. Margarejo*, *supra*, 162 Cal.App.4th at pp. 107-108; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465-1466; cf. *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612.)[27]

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[27] The pattern of criminal gang activity was established by Malley's specific testimony concerning so-called predicate offenses, and was also sufficient as to that requirement. (Cf. *In re Leland D.* (1990) 223 Cal.App.3d 251, 259-260.)

C. Gang-Murder Special Circumstance

Section 190.2, subdivision (a)(22) mandates a sentence of death or life in prison without the possibility of parole where the defendant is convicted of first degree murder and the jury finds he or she "intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang." By its express terms, the gang-murder special circumstance "contains three basic elements: (1) the defendant must intentionally kill the victim;[28] (2) while an active participant in a criminal street gang; (3) in order to further the activities of the gang." (*People v. Mejia* (2012) 211 Cal.App.4th 586, 612.) In addition, "there is a constitutional requirement that, before a defendant can be penalized for being an active participant in a criminal organization — as section 190.2, subdivision (a)(22), undoubtedly does — the defendant must be shown to have had knowledge of the gang's criminal purposes." (*People v. Carr* (2010) 190 Cal.App.4th 475, 487.)

Pursuant to CALCRIM No. 736, defendant's jurors were instructed, in pertinent part, that in order to prove the gang-murder special circumstance was true, the People had to prove: "One, the defendant intentionally killed Ka-Mya Robinson; [¶] Two, at the time of the killing the defendant was an active participant in a criminal street gang; [¶] Third, the defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; [¶] And, fourth, the murder was carried out to further the activities of the criminal street gang." "Active participation" and "criminal street gang" were also defined.

Defendant argues the prosecution presented insufficient evidence defendant was an active member of the Varrio Bakers at the time of the shooting. He also contends

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28 The doctrine of transferred intent, which was utilized in the present case with respect to Ka-Mya's killing, applies to a gang-murder special circumstance. (*People v. Shabazz* (2006) 38 Cal.4th 55, 59, 61-66.)

there was insufficient evidence he knew the Varrio Bakers engaged in a pattern of criminal activity.

Active participation in a criminal street gang means "involvement with a criminal street gang that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747; accord, *People v. Rodriguez, supra,* 55 Cal.4th at p. 1130 (lead opn. of Corrigan, J.).) "It is not enough that a defendant have actively participated in a criminal street gang at any point in time . . . . A defendant's active participation must be shown at or reasonably near the time of the crime." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

In the present case, defendant had had gang-related tattoos since at least 2005. He was contacted in a house with a Varrio Bakers member in 2011. His name and gang affiliation were found on a jail kite in 2013. Malley opined defendant was an active member of the Varrio Bakers at the time of the shooting. Santaella, who had known defendant since high school, told Moore she thought defendant was "Varrio." Moreno told Moore she heard "Varrio somethin' " at the time of the shooting. Although defendant told Moore he no longer associated with the Varrio Bakers, Littlejohn testified at trial that he heard defendant say "Varrio Bakers" a few seconds before the shots were fired. Although jurors were not required to credit Littlejohn's testimony, we cannot say they rejected it, and we cannot reject it since it is not inherently improbable. (See *People v. Simpson* (1954) 43 Cal.2d 553, 562.)

Taken as a whole, the foregoing evidence was sufficient to establish the active participation element of the gang-murder special circumstance. In our view, it was also sufficient to permit a reasonable inference defendant knew Varrio Bakers members engaged in a pattern of criminal gang activity.

This knowledge element correlates to the active membership test described in *Scales v. United States* (1961) 367 U.S. 203, 228, that is, " ' "guilty knowledge and intent" of the organization's criminal purposes' [citation], and does not require a

defendant's subjective knowledge of particular crimes committed by gang members . . . ." (*People v. Carr*, *supra*, 190 Cal.App.4th at p. 488, fn. 13; see *People v. Castenada*, *supra*, 23 Cal.4th at p. 749.) "[T]he evidence that allows a jury to find a felony was committed for the benefit of a gang within the meaning of section 186.22, subdivision (b)(1), also typically supports a finding the defendant knew of the criminal activities of the gang. . . . [J]ust as a jury may rely on evidence about a defendant's personal conduct, as well as expert testimony about gang culture and habits, to make findings concerning a defendant's active participation in a gang or a pattern of gang activity, it may also rely on the same evidence to infer a defendant's knowledge of those activities. [Citation.]" (*People v. Carr*, *supra*, at pp. 488-489, fn. omitted.)

The shooting in the present case could be used to help establish the pattern of criminal gang activity. (*People v. Loeun* (1997) 17 Cal.4th 1, 9-10.) Considering it in conjunction with the other evidence concerning defendant and Malley's expert opinions and testimony, *ante*, we conclude reversal of the gang-murder special circumstance for insufficient evidence is unwarranted. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

IV

ADMISSION OF TESTIMONY VELASQUEZ WAS A VARRIO BAKERS IN BAD STANDING

Defendant contends the trial court abused its discretion, and violated defendant's Sixth Amendment confrontation rights, by admitting hearsay testimony that Velasquez was a Varrio Bakers member in bad standing. We conclude any error was harmless.

A. Background

Defendant moved, in limine, for an order that all objections made be deemed made under the federal Constitution, and that, as to any in limine motion, no further objection was required to preserve an issue for appeal. Defendant's 22d in limine motion was titled, "**Bifurcate and limit gang evidence**." In part, defendant asserted the Sixth Amendment ensured his right to a fair trial, and cited cases — including *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) — explicating his rights to confrontation and

cross-examination. These points were made in a discussion of the law applicable to expert testimony generally. They did not reference any specific gang testimony that was anticipated. In their motion in limine to introduce expert gang testimony, the People — again without reference to any specific anticipated testimony — asserted *Crawford* did not limit a gang expert's ability to rely on hearsay as the basis for his or her opinion. The trial court granted the federalization and preservation motions. Although the court held an Evidence Code section 402 hearing at which Malley testified, after which it ruled on his qualifications as an expert and the defense request to bifurcate the gang allegations, it did not address any hearsay or *Crawford* issues.

At the outset of testimony concerning officers' prior contacts with defendant, defense counsel requested and was granted a standing objection "to all these questions" on the grounds of improper character evidence. The trial court confirmed the prosecutor was offering the evidence as a basis for an expert's opinion, ruled the evidence could come in for that limited purposes, and overruled the objection but allowed the standing objection to remain. The following took place during the prosecutor's direct examination of Littlefield:

> "Q. Were you working back July [sic] 7th of 2012?
>
> "A. I was.
>
> "Q. At that date and time did you have contact with a person named Alfred Herrera?
>
> "[DEFENSE COUNSEL]: Same objection that's standing to all these questions, Judge, please.
>
> "THE COURT: It's my understanding — are you offering this, sir, for the basis of a subsequent expert's opinion?
>
> "[PROSECUTOR]: Yes, I am.
>
> "THE COURT: Comes in for that limited purpose.
>
> "BY [PROSECUTOR]:

"Q. Did you have contact with Alfred Herrera back on June 7th, 2012?

"A. I did.

"Q. Who is Alfred Herrera? [¶] . . . [¶]

"A. He's an elder Varrio Baker member. [¶] . . . [¶]

"BY [PROSECUTOR]:

"Q. Have you had contact with Mr. Herrera before?

"A. I have.

"Q. And has he admitted to you before that he's a member of the Varrio Bakers?

"[DEFENSE COUNSEL]: Objection; hearsay. I think Mr. Herrera has a Miranda issue too.

"THE COURT: Is this coming in for a limited purpose?

"[PROSECUTOR]: It is, same limited purpose.

"THE COURT: For that limited purpose only, not for the truth of the matter, it may be received. Objection overruled.

"BY [PROSECUTOR]:

"Q. During your conversation with Mr. Herrera, did he tell you whether or not he knew Anthony Chacon?

"A. He did.

"Q. What did he tell you?

"[DEFENSE COUNSEL]: Object. Your Honor, we need a 352.

"THE COURT: Brief sidebar.

"(A conference was held at sidebar which was not reported.)

"THE COURT: Returning to open court with both counsel. [¶] Last objection overruled. The answer comes in for the limited purpose of it being used as a potential basis for an expert's opinion.

"BY [PROSECUTOR]: [¶] . . . [¶]

"Q. Did Mr. Herrera tell you whether or not he knew Mr. Chacon?

"[DEFENSE COUNSEL]: Same objection. May I have them all for these questions?

"THE COURT: So noted, sir. [¶] . . . [¶]

"BY [PROSECUTOR]:

"Q. Did Mr. Herrera tell you he knew Mr. Chacon?

"A. He said he was familiar with the particular incident involving Mr. Chacon. [¶] . . . [¶]

"Q. Did he know if Mr. Chacon was a member or not of the Varrio Bakers?

"[DEFENSE COUNSEL]: Well, Judge —

"THE COURT: That can be answered yes or no.

"[DEFENSE COUNSEL]: Objection; foundation.

"THE COURT: Sustained. Please lay a foundation.

"BY [PROSECUTOR]:

"Q. You said that Mr. Herrera was familiar with this case that's being prosecuted — or litigated in court, correct?

"A. Correct.

"Q. And did Mr. Herrera tell you whether or not he knew the status of a person named Caveman?

"A. He did.

"Q. What was Caveman's status?

"A. A member in bad standing with the Varrio Bakers.

"THE COURT: Did you say 'bad standing'?

"THE WITNESS: Yes, sir.

"THE COURT: Thank you.

"[PROSECUTOR]: Nothing further, Judge."

In his testimony, Malley did not reference Velasquez's purported bad standing with the Varrio Bakers. The prosecutor mentioned the subject only briefly in his argument to the jury, stating: "Question about a motive. You know, motive is one of those things that we don't have to necessarily prove. Sometimes it's important. I might have talked about it. Murder for financial gain, you've got to prove they knew about the money before they killed them to get the money, right? Motive. You don't have to prove motive in most cases. [¶] In this case there's evidence that Caveman was a Varrio Baker in bad standing. And the evidence presented through both Detective Moore and through Malley was that shooters have the most status in the gangs, and that you get status by invoking fear and enforcing the rules. I don't really know what the motive is because it's not completely developed. It's just not available. And sometimes you don't get all the available evidence. But what you have is what you get to go back and deliberate with."

The trial court subsequently instructed the jury: "Officers testified that in reaching their conclusions as expert witnesses they considered statements made by other people. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true." It also told jurors evidence admitted for a limited purpose during trial could only be considered for that purpose and for no other, and that nothing the attorneys said was evidence.

B. <u>Analysis</u>

If a witness is testifying as an expert, his or her opinion may be "[b]ased on matter . . . perceived by or personally known to the witness or made known to him [or her] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion . . . ." (Evid. Code, § 801, subd. (b).)

Generally speaking, such permissible basis evidence includes hearsay. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 366.)

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Except as provided by law, such evidence is inadmissible. (*Id*., subd. (b).) Moreover, if a hearsay statement is "testimonial," it generally cannot, consistent with the confrontation clause of the Sixth Amendment to the United States Constitution, be introduced against a defendant in a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her. (*Crawford*, *supra*, 541 U.S. at pp. 53-54.) From *Crawford* and the United States Supreme Court's opinion in *Davis v. Washington* (2006) 547 U.S. 813, the California Supreme Court has derived these basic principles:

> "First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony — to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984, fns. omitted.)

In *Sanchez, supra,* 63 Cal.4th 665, an opinion filed after the completion of defendant's trial, the state high court addressed the interplay between basis evidence, the

hearsay rule, and *Crawford*. Turning first to the hearsay issue, the court observed: "If statements related by experts as bases for their opinions are not admitted for their truth, they are not hearsay. Neither the hearsay doctrine nor the confrontation clause is implicated when an out-of-court statement is not received to prove the truth of a fact it asserts. [Citations.]" (*Sanchez, supra*, 63 Cal.4th at p. 681.) The court concluded, however, that "[w]hen an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true." (*Id.* at p. 684.) "Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his [or her] opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Ibid.*, fn. omitted.)[29]

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29 The court provided the following example: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Sanchez, supra*, 63 Cal.4th at p. 677.)

The court also clarified: "Our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and . . . testimony relating such background information has never been subject to exclusion as

With respect to the confrontation issue, the state high court observed: "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception. What they cannot do is present, as facts, the content of testimonial hearsay statements." (*Sanchez, supra,* 63 Cal.4th at p. 685.) "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . , or for some primary purpose other than preserving facts for use at trial. Further, testimonial statements do not become less so simply because an officer summarizes a verbatim statement or compiles the descriptions of multiple witnesses." (*Id*. at p. 694.)

The California Supreme Court adopted the following rule: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra,* 63 Cal.4th at p. 686, fn. omitted.)

Sanchez does not discuss whether, where expert testimony is concerned, an objection on state law (hearsay) grounds is sufficient to preserve for appeal the federal

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hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Sanchez, supra,* 63 Cal.4th at p. 685.)

constitutional claim. The California Supreme Court has repeatedly held that where no constitutional basis was offered for an objection at trial to the admission of evidence, "a constitutional claim is not cognizable on appeal unless (1) it 'is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution.' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 353; accord, *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; *People v. Partida* (2005) 37 Cal.4th 428, 435.)

Generally speaking, a *Crawford* objection "invokes different legal standards than . . . a hearsay objection . . . ." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1217, petn. for cert. pending, petn. filed Sept. 7, 2016; accord, *People v. Chaney* (2007) 148 Cal.App.4th 772, 779; see *People v. Blacksher* (2011) 52 Cal.4th 769, 811; but see *People v. Loy* (2011) 52 Cal.4th 46, 66 & fn. 3.) This being the case, we decline to interpret *Sanchez* as overruling, sub silentio, the line of cases requiring a specific objection to preserve a confrontation clause claim. (E.g., *People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.)

In light of the foregoing, we conclude defendant's Sixth Amendment claim has not been preserved for appeal. His continuing objection was not granted on confrontation grounds. (Cf. *People v. Johnson* (2015) 61 Cal.4th 734, 761.) Although the trial court granted defendant's in limine request that all objections made be deemed made under the federal Constitution, this did not serve to preserve any issues invoking facts or legal standards different from those the trial court itself was asked to apply — in other words, those as to which the objection on appeal "is not merely a constitutional 'gloss' upon an objection raised below . . . ." (*People v. Redd*, *supra*, 48 Cal.4th at p. 730, fn. 19; accord,

People v. Hartsch (2010) 49 Cal.4th 472, 493, fn. 19.) Even if we were to consider defendant's in limine references to *Crawford* sufficient in this regard, the trial court never made an in limine ruling addressing that subject, and defendant never reasserted a *Crawford* objection or pressed for a ruling when the specific evidence he now challenges was presented. We cannot say, on the record before us, that any such objection would have been futile. Under the circumstances, the issue has been forfeited. (See, e.g., *People v. Valdez* (2012) 55 Cal.4th 82, 143; *People v. Lindberg* (2008) 45 Cal.4th 1, 48; *People v. Ramos*, *supra*, 15 Cal.4th at p. 1171.)

In any event, we conclude defendant has failed to demonstrate prejudice under either state law (*People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error requires reversal only if it is reasonably probable error had effect on verdict]) or the federal Constitution (*Chapman v. California* (1967) 386 U.S. 18, 24 [reversal is required under federal Constitution unless error was harmless beyond a reasonable doubt]). (See *Sanchez*, *supra*, 63 Cal.4th at p. 698 [improper admission of hearsay may constitute state law statutory error, while erroneous admission of testimonial hearsay may constitute confrontation violation].) The trial court ruled the testimony concerning Velasquez's alleged bad standing in the gang came in for the limited purpose of a basis for a subsequent expert's opinion. The court stated this three times in front of the jury during the prosecutor's examination of Littlefield. As we have noted, jurors subsequently were instructed that if evidence was admitted for a limited purpose, they could consider it only for that purpose. They were also instructed that statements of other people considered by experts could be considered only to evaluate the expert's opinion and not for their truth.

Although such instructions may not have been sufficient to render harmless any error in *Sanchez*, where the gang expert relied heavily on case-specific testimonial hearsay (*Sanchez*, *supra*, 63 Cal.4th at pp. 684, 698-699), here Malley never even

mentioned the challenged evidence.[30] Since jurors were told they could consider the evidence *only* as a basis for Malley's opinion, and nothing Malley said suggested he based his opinions in any manner or to any degree on the specific evidence, we must conclude jurors followed the instruction and so did not consider the evidence for any purpose. "Jurors are routinely instructed to make . . . fine distinctions concerning the purposes for which evidence may be considered, and we ordinarily presume they are able to understand and follow such instructions. [Citation.] Indeed, [the California Supreme Court] and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury.' [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 139; see, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9; *People v. Homick*, *supra*, 55 Cal.4th at p. 851; *People v. Myles* (2012) 53 Cal.4th 1181, 1211-1212; *People v. Avila*, *supra*, 38 Cal.4th at p. 575.) "We see no reason to abandon the presumption in this case, where the relevant instructional language seems clear and easy to understand." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 139.) Nor do we see any reason to abandon it merely because the prosecutor briefly referred to the challenged evidence or because the jury struggled with the issue of intent to kill *on count 1* — the murder of Ka-Mya that was based on transferred intent.

V

FLIGHT INSTRUCTION

Defendant contends he was prejudiced by the giving of an instruction on flight that was unsupported by the evidence. We disagree.

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[30] Although Malley opined the shooting would intimidate law enforcement by showing individuals were conducting business by shooting members of their own gang, he had already testified generally concerning internal gang disciplinary measures that could include a member being killed.

A. Background

At trial, evidence was presented that defendant was a passenger in a vehicle when the shots were fired, and after the shooting, the vehicle drove off. Defendant subsequently was apprehended when returning to the United States from Mexico. He claimed he was not present at the shooting, and was simply driven to Mexico by a friend so he could visit his grandfather at his grandfather's ranch. Upon arrival, defendant learned his grandfather had passed away.

During the jury instruction conference, defense counsel objected to the trial court instructing on flight. He argued there was no evidence defendant fled, since, even assuming defendant was present in the vehicle, he was not the driver and so could not flee, in addition to which visiting one's family in Mexico did not constitute flight. The prosecutor responded the evidence showed the driver and passenger cooperating in some respects, as they were together for some time, drove down and stopped at the corner of Virginia and South Robinson, and immediately took off and left the scene after the shooting. The prosecutor also argued the jury could choose to disregard defendant's statements about why he went to Mexico.

The trial court determined it was required to give the instruction under the circumstances. Defense counsel then asked the standard instruction be modified to state that the fact defendant entered Mexico in and of itself was not evidence of flight. The prosecutor had no objection. Upon modification, defense counsel withdrew his objection to the instruction.

The trial court subsequently instructed the jury with CALCRIM No. 372, as modified, to wit: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself. The fact that Mr. Chacon was apprehended in Mexico in and of itself is not necessarily evidence of flight." Jurors were

also told some of the instructions might not apply, depending on their findings of the facts of the case; not to assume, just because the court gave a particular instruction, it was suggesting anything about the facts; and to decide what the facts were and then follow the instructions that applied to the facts as the jury determined them.

B. Analysis

" 'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.' [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 137.) "Instruction on an entirely permissible inference is invalid as a matter of due process only if there is no rational way the jury could draw the permitted inference. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1244.)

"In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' [Citations.] ' "[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." ' [Citation.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) Evidence a defendant merely left the scene is not sufficient, standing alone. (*People v. Boyce* (2014) 59 Cal.4th 672, 690; *People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Whenever the prosecution relies on evidence of a defendant's flight as tending to show guilt, an instruction on flight must be given. (§ 1127c.)[31] "To obtain the

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31 That the United States Supreme Court has recognized there may be reasons for flight apart from consciousness of guilt (e.g., *Illinois v. Wardlow* (2000) 528 U.S. 119, 125; *Wong Sun v. United States* (1963) 371 U.S. 471, 483, fn. 10) does not change this fact. Section 1127c "makes mandatory the giving of an instruction on flight where evidence of a defendant's flight is relied upon as tending to show guilt, and the giving of such an instruction in appropriate cases repeatedly has been approved. [Citations.]" (*People v. Cannady* (1972) 8 Cal.3d 379, 391-392, fn. omitted.)

instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence. [Citation.]" (*People v. Bonilla, supra,* 41 Cal.4th at p. 328.) The evidence of flight need not be uncontradicted. (*People v. Richardson* (2008) 43 Cal.4th 959, 1020.)

Here, the evidence showed defendant was driven away from the scene immediately after the shooting, and at some point went to Mexico. Jurors were not required to credit his explanation for why he went to Mexico. (See *People v. Lucas* (1995) 12 Cal.4th 415, 471; *People v. Turner* (1990) 50 Cal.3d 668, 694-695.) The fact defendant did not drive himself from the scene does not preclude the possibility he was fleeing (see *People v. Jackson* (1996) 13 Cal.4th 1164, 1226), nor does the fact the evidence did not show exactly when he went to Mexico (see *People v. Leon* (2015) 61 Cal.4th 569, 607).

Although the evidence of flight was not overwhelming, it was sufficient to permit the jury to find defendant fled to Mexico to avoid being arrested. (See, e.g., *People v. Abilez* (2007) 41 Cal.4th 472, 522; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 329; *People v. Forsythe* (1884) 65 Cal. 101, 104; cf. *People v. Green* (1980) 27 Cal.3d 1, 36-37, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 234-237 & disapproved on another ground in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; *People v. Watson* (1977) 75 Cal.App.3d 384, 403.) Consequently, there was sufficient evidentiary support to warrant the instruction, even though jurors could have attributed an innocent explanation to defendant's conduct or even concluded he was not at the scene. (See *People v. Bonilla*, *supra*, 41 Cal.4th at p. 329; *People v. Lucas, supra,* 12 Cal.4th at p. 471; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1270.)

The flight instruction is a cautionary one that benefits the defense " 'by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." [Citation.]' [Citation.]" (*People v. Leon, supra,* 61

Cal.4th at p. 608.) It is neither argumentative nor irrational. (*Ibid*.) As given in this case, the instruction assumed neither that flight was established nor that defendant fled; rather, both existence and significance were left to the jury (*People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183; *People v. Crandell* (1988) 46 Cal.3d 833, 870, overruled on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365), as was the determination whether defendant was even present at the shooting (see *People v. Cannady*, *supra*, 8 Cal.3d at p. 391). "The instruction . . . did not presuppose the commission of the crime charged [citation]; it assumed neither the guilt nor flight of the defendant [citation]; nor did it withdraw defendant's explanation of his absence from consideration by the jury." (*People v. Daener* (1950) 96 Cal.App.2d 827, 833.) If jurors found defendant was not present at the shooting or that his flight was not shown, "they would have disregarded the flight instruction as they were also instructed. [Citations.]" (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1020.)

The trial court did not err by giving CALCRIM No. 372.

VI

CUMULATIVE PREJUDICE

Defendant contends his trial was rendered fundamentally unfair by the cumulative effect of multiple errors. We have identified only one trial error and concluded it was harmless beyond a reasonable doubt. (See *People v. Martinez* (2010) 47 Cal.4th 911, 968.) "Defendant was entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) He received that to which he was entitled.

VII

SENTENCING ERROR

With respect to count 2, the attempted murder of Velasquez, the People prosecuted defendant on theories of premeditation and discharge of a firearm from a motor vehicle, both of which, they alleged, brought the crime within the purview of section 189. The jury found true the crime was committed by shooting from a motor vehicle, but not true

the allegation it was premeditated. Apparently believing the drive-by finding rendered the offense attempted first degree murder that was punishable by life imprisonment, and taking into account the gang enhancement (§ 186.22, subd. (b)(5)), the trial court imposed a term of 15 years to life in prison, plus a firearm enhancement.[32]

Defendant now contends the sentence is unauthorized, and he is entitled to a remand for resentencing. The Attorney General agrees. So do we.

Had defendant succeeded in killing Velasquez, the jury's true finding on the drive-by allegation would have been sufficient, upon a conviction for murder, to render the offense first degree murder under section 189. Section 664 sets out the punishment for attempt, however. Under subdivision (a) of that statute, the prescribed sentence for attempted murder is five, seven, or nine years in prison *unless* it has been pled, and the jury has found, the murder attempted was willful, deliberate, and premeditated. (See *People v. Smith* (2005) 37 Cal.4th 733, 740; *People v. Seel* (2004) 34 Cal.4th 535, 548; *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1049.) Since the jury expressly did not so find here, the sentence imposed on count 2 was unauthorized.

Upon remand, the trial court must resentence defendant on count 2 by choosing the appropriate determinate term specified by subdivision (a) of section 664. As the Attorney General points out, the court must also impose the appropriate terms for the section 186.22, subdivision (b)(1) and section 12022.53, subdivision (c) enhancements found true by the jury with respect to count 2.

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32 Subdivision (b)(5) of section 186.22 provides that where a felony punishable by imprisonment in the state prison for life is committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, the perpetrator cannot be paroled until he or she has served a minimum of 15 calendar years.

DISPOSITION

Sentence on count 2 (attempted murder) is vacated and the matter is remanded to the trial court with directions to resentence defendant on that count and to forward to the appropriate authorities a certified copy of the amended abstract of judgment reflecting the new sentence.

In all other respects, the judgment is affirmed.

_____
DETJEN, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
KANE, J.